

12-16-2015

State v. Nebrensky Respondent's Brief Dckt. 43418

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/not_reported

Recommended Citation

"State v. Nebrensky Respondent's Brief Dckt. 43418" (2015). *Not Reported*. 2649.
https://digitalcommons.law.uidaho.edu/not_reported/2649

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

LORI A. FLEMING
Deputy Attorney General

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43418
Plaintiff-Respondent,)	
)	Kootenai County Case No.
v.)	CR-2015-3883
)	
ELVIN NEBRENSKY,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Nebrensky failed to establish that the district court abused its discretion by imposing a unified sentence of life, with six years fixed, upon his guilty plea to sexual battery of a minor?

Nebrensky Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Nebrensky pled guilty to sexual battery of a minor, in violation of I.C. § 18-1508A(1)(a), and the district court imposed a unified sentence of life, with six years

fixed. (R., pp.108-10.) Nebrensky filed a notice of appeal timely from the judgment of conviction. (R., pp.111-14.)

Nebrensky asserts his sentence is excessive in light of his employment history, military service, status as a first-time felon, substance abuse, physical and mental health issues, acceptance of responsibility, and purported remorse. (Appellant's brief, pp.3-7.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum sentence for sexual battery of a minor in violation of I.C. § 18-1508A(1)(a) is life in prison. I.C. § 18-1508A(4). The district court imposed a unified sentence of life, with just six years fixed, which falls well within the statutory guidelines. (R., pp.108-10.) At sentencing, the state addressed the egregious nature of the

offense, the great harm done to the victim, Nebrensky's dishonesty and questionable rehabilitative potential, and the risk he presents to the community. (Tr., p.46, L.10 – p.49, L.8 (Appendix A).) The district court subsequently set forth its reasons for imposing Nebrensky's sentence. (Tr., p.55, L.2 – p.58, L.14 (Appendix B).) The state submits that Nebrensky has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Conclusion

The state respectfully requests this Court to affirm Nebrensky's conviction and sentence.

DATED this 16th day of December, 2015.

/s/
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 16th day of December, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JENNY C. SWINFORD
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

_____/s/_____
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

APPEAL TRANSCRIPT

DOCKET NO. 43418

44

1 THE COURT: You can call that witness.

2 MR. VERHAREN: Rebecca White.

3 REBECCA LYNN WHITE,

4 called as a witness at the request of the

5 plaintiff, being first duly sworn, was

6 examined and testified as follows:

7 DIRECT EXAMINATION

8 QUESTIONS BY MR. VERHAREN:

9 Q. Ma'am, would you please state your full name,

10 spell both your first and last names, and then describe

11 for us your professional background?

12 A. My name is Rebecca Lynn White,

13 R-e-b-e-c-c-a W-h-i-t-e. I'm a licensed professional

14 counselor in the state of Idaho, and I've been in the

15 helping profession for about ten years.

16 Q. In that capacity are you treating the victim

17 in this case?

18 A. Yes.

19 Q. Can you tell us what the focus of your

20 treatment of that person is at this point?

21 A. The focus of our sessions at this point is

22 keeping Hunter alive. I am conducting a full suicide

23 assessment every time I meet with Hunter which averages

24 once a week. I saw him twice last week because I was

25 concerned even more so than usual about his safety.

46

1 THE COURT: Okay. And what will happen next,

2 Mr. Nebrensky, is I'm going to hear from the attorneys,

3 listen to their recommendations, and then I'll give you

4 a chance to tell me or your victim or your victim's

5 family anything that you would like. Do you understand

6 that procedure?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. State's

9 recommendations, Mr. Verharen?

10 MR. VERHAREN: Judge, I think that you should

11 send him to prison for life with twenty years fixed, and

12 the reason for that recommendation is essentially two.

13 The first is the risk that you take if you let him out

14 of prison before then, and I think that risk is

15 manifested in a couple of different ways.

16 First of all, in terms of the psychosexual

17 evaluation, I pointed out a couple of inconsistencies

18 that are present that I noted in terms of what was on

19 his Facebook account and what he told the evaluator.

20 They may seem minor at first blush, but when you really

21 think about it, it really goes to the heart of whether

22 or not he can be rehabilitated. If he can't tell that

23 psychosexual evaluator the truth about something that

24 really may not even be relevant to the crime, but if he

25 can't tell that person the truth, then I don't know how

45

1 Q. And this suicide tendencies that he has, what

2 are they related to?

3 A. They are related to his abuse.

4 Q. Sexual abuse?

5 A. Yes.

6 Q. Anything else that you think particularly

7 relevant in terms of what the Court should know about

8 Hunter in your treatment of Hunter?

9 A. I would just reiterate that Hunter continues

10 to be very high risk of suicide. He has intent and plan

11 in place that he looks for any means in order to execute

12 his plan.

13 Q. In your treatment of Hunter does he make clear

14 that he is afraid that the defendant will get out of

15 custody?

16 A. Yes, he does.

17 MR. VERHAREN: No other questions, Judge.

18 MR. NELSON: Judge, I have no questions.

19 THE COURT: Okay. Thank you. You can go

20 ahead and step down.

21 MR. VERHAREN: And that is all the evidence I

22 had, Judge.

23 THE COURT: All right. And any witnesses by

24 the defense?

25 MR. NELSON: None, Judge.

47

1 the Court can make an assessment about whether or not he

2 can be rehabilitated. The psychosexual evaluator even

3 noted that, I thought, in the evaluation when he wrote

4 on Page 10 of 12, second paragraph from the top, quote,

5 the main finding on the MS-II is that the client was

6 highly defensive on testing, and as a result the

7 information contained in this report is extremely

8 limited. My point here, Judge, is I don't think the

9 evaluator had all of the information necessary to make a

10 complete evaluation, and I don't think the Court can

11 rely on it.

12 Instead, I think the Court should look at the

13 two things that I mentioned I think are relevant in

14 terms of imposing sentence here, and the first one is

15 what he did in terms of going about getting to Hunter.

16 This isn't a situation where it was a snap decision. It

17 isn't a situation where he became intoxicated and on one

18 occasion took advantage of a minor. This isn't a

19 situation where that person was thrust into a

20 circumstance with him where he couldn't control himself.

21 It's a situation where he spent a lot of time, he spent

22 a lot of trouble getting Hunter to trust him, and

23 obviously what I'm talking about, Judge, is grooming,

24 and the extent that he took in terms of grooming in this

25 case I think is something the Court should really

APPEAL TRANSCRIPT

DOCKET NO. 43418

48

1 consider when you're deciding what to do with his
2 sentence.

3 It was money. It was time. It was Facebook.
4 It was just giving that boy special attention so that
5 boy would trust him, and it's not something that took
6 place over a couple of hours, couple days, couple weeks.
7 It went on for a couple of months, and when you think
8 about that kind of behavior, the intent, the
9 premeditation, the planning that went into it to get to
10 the end result, basically destroying that boy's life, I
11 think that sort of conduct is worthy of the sentence
12 that I've recommended here.

13 The second reason I think the sentence that I
14 suggested to you is justified is simply what it has done
15 to that boy. In cases like this sometimes we have to
16 speculate what the impact of sexual molestation is going
17 to do to a child. Often that's because the child can't
18 articulate very well how it impacts them. Sometimes
19 it's because the impact isn't known for a couple of
20 months or a couple of years. It doesn't raise its head
21 for a while, but in this case, Judge, you know what the
22 impact of his conduct on this boy is and you know what
23 it is today, and it really can't get much worse. He
24 took a boy. He, through great length, got to this boy
25 and then took advantage of this boy and basically ruined

49

1 his life, ruined his family's life, and I don't think
2 it's a situation obviously that the Court can fix.

3 I think you can do one thing, Judge. You can
4 make that boy feel safe. The way you can make that boy
5 feel safe is to keep him locked up until he can't hurt
6 anybody, and I think if you do that for at least twenty
7 years, that will be the case, so that's the reason for
8 that recommendation.

9 Restitution is obviously an issue, as you
10 heard his mother describe to you, and I'd simply ask
11 that you leave that open for a period of time. Thank
12 you.

13 THE COURT: All right. Thank you,
14 Mr. Verharen. And Mr. Nelson.

15 MR. NELSON: Judge, we do not object to
16 leaving the issue of restitution open for a period of
17 time. That's something Elvin has been expecting would
18 be a responsibility for his actions.

19 Here for sentencing today is a 59-year-old
20 man. His prior criminal record consists of an
21 inattentive driving that was reduced from a DUI. It was
22 about five years ago when he received that. He's had a
23 very active life. He spent twenty-two years in the
24 United States Navy. He retired from there. We've
25 submitted a number of commendations that he received

50

1 while he was in the Navy. He was a good seaman. He did
2 his job, did it well, and did the things he was required
3 to do.

4 Life has not been easy for him the last little
5 while. He had some problems with his son that committed
6 suicide. That's a traumatic event that he hasn't dealt
7 with. I think the bankruptcy has had a significant
8 effect on him.

9 This particular case you're dealing with
10 somebody that this is a first offense and,
11 notwithstanding allegations that there are other
12 victims, this is the only victim that's come forward.
13 The polygraph that was administered in this matter said
14 he was truthful when he said this was the only victim.
15 The GAIN assessment says he's a low risk to reoffend.
16 The other assessments also say that he's a low risk to
17 reoffend.

18 I'm not trying to minimize what's happened to
19 a young man as a result of his actions. That's been
20 something that Elvin has been dealing with for the last
21 90 days in particular, and I suspect it might have had
22 something to do with his suicide attempt back in
23 February as well knowing what had gone on there, but he
24 that as it may, we'd ask the Court to consider those
25 factors.

51

1 Judge, Elvin, based on his prior record, would
2 ask the Court to consider a lengthy period of probation
3 with appropriate conditions. If the Court's not willing
4 to do that, and the prosecutor indicated he felt that
5 the evaluation wasn't complete, we would ask the Court
6 to consider retaining jurisdiction and put him in the
7 sex offender program where they'll deal with him for up
8 to a year, an evaluation will be more thorough, and we
9 could come back with information that would then allow
10 the Court to consider whether he poses a reasonable risk
11 in the community. Those would be the requests I would
12 make in Elvin's behalf, Judge. Thank you.

13 THE COURT: And Mr. Nebrensky, anything that
14 you would like to say?

15 THE DEFENDANT: Your Honorable Judge Mitchell,
16 I would like to start by apologizing to the family, the
17 victim and the courts for my indiscretion and inability
18 to see that my association with younger people and my --
19 some peers allowed my judgment to get the best of me. I
20 made stupid decisions, misused my prescription
21 medication with excessive drinking that put my life into
22 a downward spin and trouble. I wanted to be liked and
23 gain approval by trying to impress everyone, make them
24 feel or believe I am content with my life with good
25 control, which I see is not the case. This does not

APPENDIX B

APPEAL TRANSCRIPT

DOCKET NO. 43418

52

1 justify what I did which I am truly sorry for.
2 I lost my pride, my honor, my dignity. I will
3 be required to keep my location public for life which
4 will increase my depression and anxiety for fear of harm
5 for me and my family from the victim, his family and
6 friends, the fear of my life forever.

7 After being arrested and chained up, locked in
8 a small cell for 23 hours a day for 98 days, I have had
9 time to reflect on what put me here. I'm overwhelmed
10 with shameful guilt and remorse. I no longer will walk
11 with my head up or with pride. I will put my days into
12 my work and my family. I will have no association with
13 anyone not of my age, nor provide gifts and financial
14 aid.

15 All day I sit regretting my actions and pray
16 to God for forgiveness from everyone including my
17 victim. Being incarcerated, lots of thoughts had gone
18 through my mind and how to change my life. Number one,
19 knowing I have a problem and putting a support network
20 together for counseling and treatment; number two, have
21 no access to social media such as Facebook, Myspace or
22 sites that would tempt me; number three, I cannot expect
23 to be holy and feed on improper desires and thoughts if
24 I want to love God with a clean heart; and number four,
25 always be with an adult and stay away from places where

54

1 MR. NELSON: Judge, I have a comment. I think
2 the maximum sentence for this crime is 25 years.

3 THE COURT: You know, you are correct.

4 MR. VERHAREN: I believe it's life.

5 MR. NELSON: I don't believe so.

6 THE COURT: Well, let's look. When I
7 arraigned him I told him it was life, but this is
8 obviously an important issue right now.

9 Well, I understand, Mr. Nelson, why you would
10 have that opinion. If it was alleged as (1)(b), (1)(c)
11 or (1)(d) of Section 18-1509, then it would be a maximum
12 of 25 years. What was alleged is a violation of (1)(a),
13 and that's the allegation that your client committed a
14 lewd act or lascivious act or acts upon or with the body
15 or any part or any member thereof such minor child
16 including, but not limited to, manual-genital,
17 genital-genital contact, oral-genital contact,
18 anal-genital contact, oral-anal contact, manual-anal,
19 manual-genital, whether between persons of the same or
20 opposite sex, so that's what was charged in the
21 information. That's what's indicated on the PSI, so it
22 is life.

23 I'm giving you credit for 100 days time
24 served. You need to know you've got 42 days from
25 today's date to appeal this decision to the Idaho

53

1 young people hang out because I have an attraction to
2 both women and men, and I need to establish a
3 preventative plan to identify factors of risk in
4 situations; and number five, follow up with treatment
5 recommendations.

6 I close -- in closing, I know this definitely
7 will be an experience I will never forget, I will never
8 repeat. I ask the Court for forgiveness and mercy.
9 However, treatment is needed. Since I have never been
10 in a position like this before, I ask for a lengthy
11 period of probation with outpatient care allowing me to
12 prove myself. Again, I'm sorry and I apologize.

13 THE COURT: Mr. Nebrensky, on the charge
14 Sexual Battery of a Minor for events that happened
15 August 30th, 2014, I am sentencing you to the custody of
16 the Idaho State Board of Correction for a fixed six-year
17 sentence followed by an indeterminate life sentence,
18 total sentence not to exceed life, and commit you to the
19 custody of the Idaho State Board of Correction today. I
20 am not going to retain jurisdiction. You will serve
21 your prison sentence.

22 I'm asking the Department of Correction to
23 focus on sex offender treatment. You also need a great
24 deal of work on your honesty issues, and we'll leave the
25 issue of restitution open.

55

1 appellate courts.

2 I need to give you my reason for this
3 decision. I -- I don't have any faith in the validity
4 of the psychosexual evaluation, the psychological/
5 psychosexual evaluation of Paul Wert. It is clear to me
6 that you lied on the portions that were discussed by
7 Mr. Verharen in his argument, the portion of the sexual
8 History Behavior. Roman Numeral X was something that I
9 noted right away because the statement, quote, He
10 reported that his sexual interest has always been women,
11 is directly contradicted by all of your statements that
12 were found as evidence between you and your victim. I
13 mean it's just ridiculous to even make that claim to --
14 for you to make that claim to Dr. Wert. And then
15 Exhibit 1, I haven't looked at it, but I'm sure it
16 represents everything that Mr. Verharen and his
17 investigator indicated it would, certainly indicates
18 that that's false, so if you've lied to the presentence
19 or the psychosexual evaluator and your only chance to
20 get it right and avoid prison, I just don't -- I don't
21 have any hope for you being treated successfully in the
22 community now or at the end of a rider, and I find that
23 you would be an unacceptable risk to be placed on
24 probation -- unacceptable risk to the public to be
25 placed on probation either now or after a rider.

APPEAL TRANSCRIPT

DOCKET NO. 43418

56

1 Your text messages that are attached to the
2 presentence report and the police report are especially
3 disturbing. Not only are they predatory, they are, as
4 Mr. Verharen characterized, grooming, but it's also
5 apparent from those materials that you knew that you
6 were making sexual advances to a child, and you knew
7 that all along, and it's especially disturbing --
8 because of family members here, I won't go into the
9 details, but Mr. Price -- you asked -- well, you asked
10 about what essentially favors you could perform, this is
11 on Page 8 of 13 on the police report, and so you asked
12 when that could happen, and Mr. Price said, "I don't
13 know. Whenever." You said, "How?" And Mr. Price said
14 I wish my mom -- "I wish. My mom is getting up." And
15 then a little further on in the discussion with your
16 being persistent about when you would make this happen
17 with your minor victim, your minor victim said, "when
18 everyone in the house is asleep I can sneak out." Later
19 you said, "Text me when you can sneak out." Later in
20 that same string of messages back and forth you're
21 discussing trying to get pain meds from him and pay him
22 for those, and so at the bottom of Page 10 it is obvious
23 that you are offering him \$50 for some pills and a
24 sexual favor when you know this is a minor.
25 I don't know how much more twisted and wrong

57

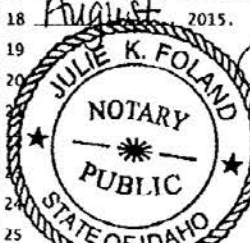
1 this gets than what you've done here, and I don't know
2 that you have other victims. I think you are perhaps
3 psychopathic enough, sociopathic enough, smooth enough
4 that you could pass any polygraph. There was testimony
5 from your victim's mother about another person who
6 hadn't yet come forth, and that -- I certainly don't
7 find the victim's mother to be at all not credible, but
8 I don't have that person's name and so I really can't
9 attach any weight to that, but what I can attach weight
10 to is what you said to the victim about how you liked
11 doing this sort of activity over and over and over
12 again, so your own words indicate as a matter of pride
13 that you enjoy doing this, so I don't know that I need
14 that person's name from the victim's mother.
15 I think this is a sentence that protects the
16 public for a long period of time in a fixed sentence and
17 gives you many years to work on whether you can be
18 treated and whether you can be honest, the two big
19 issues that I have for you right now, and if you can
20 convince them at the end of that fixed sentence of six
21 years less a hundred days, then I trust the parole
22 commission to make smart decisions on whether they ever
23 release you. If you don't do well in treatment or if
24 they have the same fears that I have right now, I
25 guarantee you that they won't let you out and that

58

1 you'll spend the rest of your life in prison, and if you
2 can't convince them that you are an acceptable risk to
3 be treated out in the community and to be out in the
4 community, I trust that they will keep you there.
5 This gives your victim six years, less a
6 hundred days, to heal before he has any concerns that
7 you'll be out, and I think it is quite likely that the
8 parole commission will keep you there beyond six years,
9 but at least for your victim he knows that he can
10 become -- go well into his 20's, establish a life on his
11 own and hopefully he can get better as well, but he
12 can -- he can go through that healing without any fears
13 that you're going to be out in the community.
14 Those are the reasons for my decision.
15 Anything further on behalf of the plaintiff?
16 MR. VERHAREN: No, Judge.
17 THE COURT: Anything further on behalf of the
18 defense?
19 MR. NELSON: No, Your Honor.
20 (Matter adjourned)
21
22
23
24
25

59

1 CERTIFICATE
2 STATE OF IDAHO)
3) ss.
4 COUNTY OF KOOTENAI)
5 I, Julie K. Foland, a duly qualified and Certified
6 Shorthand Reporter for the First Judicial District of
7 the State of Idaho, DO HEREBY CERTIFY:
8 That the above-within and foregoing transcript
9 contained in Pages 1 through 58 is a complete, true and
10 accurate transcription to the best of my ability of my
11 shorthand notes taken down at said time and place;
12 I FURTHER CERTIFY that said transcript contains
13 all material designated in the NOTICE OF APPEAL or any
14 requests for additional transcript which have been
15 served on me.
16 IN WITNESS WHEREOF, I have hereunto set my hand
17 and affixed my official seal this 10th day of
18 August 2015.
19
20
21
22
23
24
25

 Julie K. Foland
JULIE K. FOLAND, C.S.R. No. 639
Official Court Reporter
First Judicial District
State of Idaho
Commission expires 12-7-2016